No. 12,547

IN THE

United States Court of Appeals

For the Ninth Circuit

ADOLPH J. SCHNEE,
Appellant,

vs.

SOUTHERN PACIFIC COMPANY (a corporation),
Appellee.

BRIEF FOR APPELLANT.

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The appeal is by the plaintiff, Adolph J. Schnee, from a judgment entered upon a directed verdict for the defendant, Southern Pacific Company, in a personal injury action.

STATEMENT OF JURISDICTION.

The complaint for personal injury damages of $250,000 contained two causes of action, one based on the Safety Appliances and Equipment Act, 45 U.S.C., sec. 1, et seq. (T 8), the other based on the Federal Employers' Liability Act, 45 U.S.C., sec. 51, et seq. (T 11). The district court had jurisdiction. 28 U.S.C., Judiciary and Judicial Code, sec. 1331. Final judg-

ment was entered by the United States District Court for the District of Arizona March 7, 1950 (T 43). Notice of appeal to this court from the final judgment was filed April 5, 1950 (T 44). The appeal was timely. Rule 73 (a), Federal Rules of Civil Procedure. Jurisdiction of this court to review the judgment is sustained by 28 U.S.C., secs. 1291, 1294.

STATEMENT OF THE CASE.

By his complaint, filed January 8, 1948 (T 13) in the United States District Court, Northern District of California, Southern Division, plaintiff and appellant Adolph J. Schnee sought to recover personal injury damages from defendant and appellee Southern Pacific Company (T 7-13). The complaint contained two causes of action. The first cause of action was based on the Safety Appliances and Equipment Act, 45 U.S.C., sec. 1, et seq. (T 8). As the first cause of action was voluntarily dismissed at the trial (T 408) it need not be considered on this appeal. The second cause of action was based on the Federal Employers' Liability Act, 45 U.S.C., sec. 51, et seq. (T 11).

45 U.S.C., sec. 51, provides in material parts:

> "Every common carrier by railroad while engaging in commerce between any of the several states . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or in-

sufficiency, due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works . . . or other equipment.

Any employee of a carrier, any part of whose duties as such employee, shall be in the furtherance of interstate . . . commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce, and shall be entitled to the benefits of this chapter."

45 U.S.C., sec. 53, provides in material parts:

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, . . . the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: . . ."

And 45 U.S.C., sec. 54, provides in material parts:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury . . . resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; . . ."

Either directly or by reference and incorporation the second cause of action alleged, in substance, that

on August 29, 1946, approximately 2 miles east of Willcox, Arizona, plaintiff was severely and permanently injured while employed as a signal maintainer in interstate commerce by defendant, a common carrier by railroad, when a motor car of defendant whereon he was riding left defendant's railroad track and roadbed whereon it was traveling (T 11-12). Negligence proximately causing the injury was ascribed to defendant as follows (T 12):

> "that defendant carelessly and negligently failed to inspect said motor car and said track and roadbed and learn of their defective, insecure and insufficient condition and carelessly and negligently failed to provide a safe motor car and safe track and roadbed for plaintiff."

In its answer to the complaint, defendant admitted it was a common carrier by railroad engaged in interstate commerce at the time plaintiff was injured and that plaintiff was employed by it in interstate commerce (T 14-16). Allegations of the complaint respecting negligence, injuries, and damages were denied by the answer (T 15-17). And the answer averred the special defense of contributory negligence and the special defense that negligence of plaintiff was the sole proximate cause of his injuries (T 17).

Pursuant to motion of defendant (T 22-24) an order was made December 3, 1948, by the United States District Court, Northern District of California, Southern Division, transferring the case to the United States District Court for the District of Arizona (T 27-28), where jury trial was commenced February 28, 1950 (T 48).

Before any evidence was offered by the parties at the trial, it was stipulated "as a proven fact that on August 29, 1946, at the time this accident occurred that Mr. Schnee, the plaintiff in the action was an employee of the Southern Pacific Company engaged in interstate commerce and acting within the scope of his employment as a signal maintenance man" (T 50).

Early in the trial the court ruled that the issue or "cause" of liability be first tried and evidence confined to that issue (T 66). At the conclusion of the evidence offered by plaintiff on the issue, defendant moved for a directed verdict on the following ground and the court ruled on the motion as follows (T 135-137):

> "Mr. Henderson. We would like to make a motion for a directed verdict as of the close of plaintiff's case on the ground the case does not fall within the federal rule that the evidence has to be more than a mere scintilla, has to be more than a conjectural showing of negligence on the part of the defendant here. The specific motion is based on failure of proof and failure of any proof that will raise any reasonable inference on the part of this plaintiff which is sufficient to go to a Jury on the question of the defendant's negligence. * * *
>
> The Court. I will hear you again at the conclusion of all the testimony on the question of liability."

Near the close of all the evidence on the issue of liability defendant renewed its motion for a directed verdict as follows (T 405-406):

"Mr. Henderson. We renew our motion to the Court to direct a verdict in this case at the close of all the evidence that has been ruled on and the unconditional admissibility of the statements here. The motion is that at the conclusion of all the evidence there is still no competent evidence here to prove beyond perhaps a mere scintilla which is not the rule in Federal Court, the defendant has been negligent in any respect whatsoever."

Additional evidence on the issue of liability was thereafter offered by defendant and also by plaintiff in rebuttal (T 408-443). Additional arguments on the motion followed, and on March 6, 1950, the court granted the motion and directed a verdict as follows (T 448):

"The Court. Gentlemen of the Jury, I have been hearing arguments of counsel in your absence as to legal liability in this case and in my opinion there is none, therefore I instruct you to return a verdict for the defendant. I appoint Mr. Otis as foreman. The verdict is returned at my direction, gentlemen, so the responsibility is mine."

As directed, the jury returned the following verdict (T 42):

"We, the jury, duly empaneled and sworn to try the above-entitled cause, do, by direction of the Court, find for the defendant.

Dated this 6th day of March, 1950.

/s/ Chas. W. Otis,
Foreman."

And judgment for defendant on the directed verdict was entered March 7, 1950. Specifications of Error herein are addressed to the ruling of the court directing the verdict for defendant and to the judgment entered on the directed verdict.

The test which governs review of a directed verdict is well settled. It is thus stated in the recent case of *Ford v. Southwestern Greyhound Lines,* 5 Cir., 180 F. 2d 934, at page 935:

> "The evidence must be viewed in the light most favorable to the losing party. Every inference that may properly be drawn from the evidence must be indulged against the instruction. If the record reflects any substantial testimony of probative force in favor of the losing party, same forbids a directed verdict. A peremptory charge is warranted only when the evidence is such that no other reasonable verdict can be rendered and the winning party is entitled, as a matter of law, to a judgment."

See, also, 2 Barron & Holtzoff, Federal Practice and Procedure, 759-762, sec. 1075.

And the summary of the evidence which follows is made in the light of the rule stated in *Wilkerson v. McCarthy,* 336 U.S. 53, 57, 69 S. Ct. 413, 415, 93 L. Ed. 497, where, in reversing a judgment on a directed verdict for defendant in a Federal Employers' Liability Act case, the Supreme Court said:

> "It is the established rule that in passing upon whether there is sufficient evidence to submit an issue to the jury we need look only to the evidence and reasonable inferences which tend to support

the case of a litigant against whom a peremptory instruction has been given."

On August 29, 1946, the date he was injured, plaintiff was a signal maintenance man in the employ of the defendant (T 51-52). He was 25 years of age and had entered the employ of defendant on July 1, 1946 (T 51, 215). He worked out of Willcox, Arizona, which is approximately 85 miles railroad east of Tuscon, Arizona (T 52). His work schedule for August 29, 1946, required him to inspect and service a block signal about 2 miles railroad east of Willcox (T 59). For the discharge of his duties defendant had assigned to plaintiff a motor car which operated forward or backwards on the railroad tracks (T 55-56, 59). After his lunch hour, plaintiff left Willcox for the block signal, operating the motor car forward and railroad east on the north track of the main line of the railroad (T 57-59). When he reached the block signal he inspected it and found certain equipment defective and in need of replacement (T 59-61). He did not have the necessary replacement equipment on the motor car and he returned to Willcox to obtain it, operating the motor car backwards railroad west on the said north track (T 63-64). Having obtained the necessary replacement equipment at Willcox he again started for the block signal, operating the motor car forward railroad east on the said north track at a speed around 17 miles an hour (T 65-68).

Plaintiff had reached a point ¼ to ½ mile railroad west of the block signal when the accident resulting in his injury occurred (T 403). As to what happened

at the time, plaintiff testified as follows (T 68-71): "I was sitting on the seat provided for the maintainer, which is on the left-hand side in this case facing east or facing with the front end of the car, east"; "I was watching the railroad signals"; "I was watching the horizon for smoke, which is also an indication for trains approaching"; "I was watching making sure that the track was clear"; "the sensation I had, the last sensation I had before I don't remember anything was a jolt, a jar, an abnormal movement of the car"; "It felt as though it was leaving the track or not running on the track just for an instant"; "it was merely this one instant I was conscious of"; "it was up more than sideways, instead of sideways movement. You generally always have a sort of a fishtail's movement"; "I think it something like coming up the other side of a dip in an automobile, you feel like you are going to stay up there"; "naturally I was sitting right on the car. It sort of came from the bottom, that is pressure, a sudden jolt caught me from the bottom like somebody pounding on this chair and lifting it up"; "it felt like (the car lifted)"; "I felt as though at the time that the instant I was sitting on the car there as though I was moving sideways or one way or the other. I felt a jolt coming from the bottom up, a lifting sensation"; "the (next) sensation I experienced (was) of arousing from a sleep"; "I don't recall anything between that and the last sensation I just described, that jolt"; "I felt as though I wanted to go back to sleep. I couldn't hear noises, that is, I felt by moving around I was moving in a

vacuum. I couldn't hear the noise I was making from disturbing the gravel, ground or bushes, whatever it was; that seemed strange to me. Also, my eyesight failed me quite a bit, everything looked blurry to me" (T 72).

From a "puddle of blood" at a point to which plaintiff was thrown by derailment of the motor car, plaintiff, terribly injured, crawled on his elbows or dragged himself a distance of 30 feet along the south rail back to the west; he then crossed directly over to the north of the north rail; and from there he crawled or dragged himself through grass and mud and under fences a distance of 900 or 1000 feet to within 5 feet of the shoulder of a highway where a passing motorist responded to his cries for help and summoned aid from Willcox (T 73-79, 82, 87-89).

The first persons to arrive at the accident scene were Dick Hallmark, the City Marshal of Willcox, and Richard Singleton, a miner, whom Hallmark asked to accompany him (T 80-85, 104-105). They were the first persons to see the motor car after the accident and the first persons to see the other indicia of the accident (T 105). They were able to retrace the movements and course of the motor car (T 85-86, 108).

Respecting the position of the motor car after the accident and its preceding movements and course, Hallmark and Singleton testified: The motor car, at rest, with its front end facing railroad east was entirely off the tracks and to the left or north of the

tracks (T 80-85, 104-105); the motor car had jumped the track a distance reflected by about 73 railroad crossties railroad west of where it was at rest (T 86); after jumping the track the motor car, going railroad east and straddling the north rail, angled up the track northerly a distance reflected by 60 to 65 railroad crossties (T 86); at that point the right wheels of the motor car came in contact with bolts holding the rails together and complete derailment of the motor car occurred (T 86-87); it traveled 25′ to 30′ more before it came to rest (T 87).

A short distance railroad west of where the motor car jumped the track a grade stake was found by Hallmark and Singleton (T 89, 108, 110). Respecting this grade stake Hallmark testified: Within a distance reflected by 4 railroad crossties from where the motor car jumped the track, a square grade stake (1¼″ x 1¼″), 15″ to 18″ long was laying south of the north rail (T 85, 90-91); the sharpened end of the grade stake appeared burred and small splinters were strewn along (T 90); it had oil on it (T 91); the small splinters were just south of the north rail (T 91). And respecting the grade stake Singleton testified: "The stick had been splintered, oh, for a space probably a few feet where the stake had apparently hit something. The splinters were laying along back; then we later found where it had hit and the trail of splinters ended at the stake" (T 109); there was a fresh abrasion on the side of the tie, slightly west of where the wheel marks started on the tie (T 115); fresh marks on the underside of the motor car indicated where some stake or instrument had hit the under-

side of the motor car and had apparently lifted the motor car, leaving splinters or an abrasion or a scarred place on the underside (flooring) (T 116); "The stake showed evidence of having hit something. One end of it was sheared or nubbed off and splinters were thrown from it for a matter of a few feet there" (T 117); the other end was slightly splintered (T 117); both ends showed evidence of having struck something (T 117).

In addition to the grade stake an iron brake hanger was found in the railroad roadbed at the accident scene (T 108, 142, 352); it was inside the rails and railroad west of where the motor car was at rest, but railroad east from the grade stake (T 114); it had the appearance of having been there for some time (T 115, 146, 353).

Turning to a brief description of the involved motor car the record shows the following: It weighed 495 pounds (T 156); it had 4 wheels, flanged for traction on the rails (T 52); between flanges the motor car was 4′ 8½″ wide (T 365); wheels were 14″ in diameter (T 365); power was furnished by a gasoline engine on the deck or floor in the front part of the motor car (T 53, 164, 276); it could be operated either forward or backwards (T 54); to put the motor car in operation it was necessary for the operator to push it until the motor started and to then jump on (T 225); it was equipped with adjustable wooden handles at each end so that it could be lifted on and off the rails (T 156); clearance from the bottom of the deck or flooring to the top of the ties or ballast

was 15″ to 16″ (T 365); the motor car was completely open and all parts exposed below the deck or flooring of the motor car (T 53).

Finally, and turning to roadbed conditions and inspections, the record contains the following evidence: At the accident scene the rails were 39′ long and there were 24 railroad ties to each rail (T 148); between rails the gauge was 4′ 8½″ (T 347); rails were 8″ high and tied together with "sickle bars" with 4 bolts and fixed by spiking through the tie plate (T 347); ballast was of slag (T 347); at the accident scene the ballast was 6″ lower than the ballast alongside it (T 339-340); day in and day out survey parties of defendant were constantly at work putting up grade stakes (T 171, 192); "they are put there for new surface to surface it to the stakes and center line stakes" (T 171); at times grade stakes, about 2′ long, are put between the rails in the center of the track (T 172, 175); at times grade stakes are found lying on the ground along the right of way (T 172); defendant's section foreman was charged with the duty of patroling the roadbed for such grade stakes or brake hangers and to pick them up and remove them whenever seen (T 169, 172); before the accident, on the day of the accident, two section gangs were operating in the area where the accident occurred (T 196-197); on the morning of August 29, 1946, a roadmaster in the employ of defendant made an inspection of the roadbed in the area which included the accident scene and did not see the grade stake or the brake hanger (T 188, 191-192); a division engineer who

made an inspection on the morning of August 29, 1946, including the area of the accident scene, testified, "Unquestionably I must have seen some grade stakes, but I don't recall any particular stake" (T 322-323, 343-344).

SPECIFICATION OF ERRORS RELIED UPON.

1. The District Court erred in directing a verdict for defendant upon motion of the defendant.

2. The evidence introduced at the trial was of such character that it clearly indicated and established that plaintiff was injured as the proximate result of defendant's negligence and for that reason the action of the trial court in instructing the jury to return a verdict in favor of the defendant and against plaintiff was and is contrary to the law and evidence.

3. The District Court erred in entering final judgment in favor of defendant.

ARGUMENT OF THE CASE.

THE DISTRICT COURT ERRED IN DIRECTING A VERDICT FOR DEFENDANT UPON MOTION OF THE DEFENDANT. (Specification of Error No. 1.)

The sufficiency of the evidence to support a judgment for plaintiff and appellant may be demonstrated by an application of the doctrine of *res ipsa loquitur,* or it may be demonstrated without application of that

doctrine. In this subdivision appellant undertakes both demonstrations.

(a) Res ipsa loquitur.

The scope of this doctrine in its application to Federal Employers' Liability Act cases is fully covered by the decision of the Supreme Court in *Jesionowski v. Boston & M. R.R. Co.,* 329 U.S. 452, 67 S.Ct. 401, 91 L.Ed. 355. There, as here, a derailment case was involved. In holding the doctrine applicable it was there said (329 U.S., at pages 457, 458, 67 S.Ct., at page 404):

> "Thus, the question here really is not whether the application of the rule relied on fits squarely into some judicial decision, rigidly construed, but whether the circumstances were such as to justify a finding that this derailment was a result of the defendant's negligence. We hold that they were. Derailments are extraordinary, not usual happenings. When they do occur, a jury may fairly find that they occurred as a result of negligence. It is true that the jury might have found here that this accident happened as a result of the negligence of the deceased; but although the respondent offered evidence to establish this fact, it 'did not satisfy the jury.' *Southern Ry. Etc. v. Bennett,* 233 U.S. at page 86, 34 S.Ct. at page 567. With the deceased freed from any negligent conduct in connection with the switch or the signaling, we have left an accident ordinarily the result of negligence which may be attributed only to the lack of care of the railroad, the only other agency involved. Once a jury, having been appropriately instructed, finds that the employee's

activities did not cause the derailment, the defendant remains as the exclusive controller of all of the factors which may have caused the accident. It would run counter to common everyday experience to say that, after a finding by the jury that the throwing of the switch and the signaling did not contribute to the derailment, the jury was without authority to infer that either the negligent operation of the train or the negligent maintenance of the instrumentalities other than the switch was the cause of the derailment. It was uncontroverted that the railroad had exclusive control of both. We think that the facts support the jury's finding both that the deceased's conduct did not cause the accident and that the railroad's negligence did."

And in *Johnson v. United States,* 333 U.S. 46, 48, 68 S.Ct. 391, 394, 92 L.Ed. 360, it was said:

"The rule of res ipsa loquitur applied in *Jesionowski v. Boston & Maine R. Co.,* supra, means that 'the facts of the occurrence warrant the inference of negligence, not that they compel such an inference.' *Sweeney v. Irving,* 228 U.S. 233, 240, 33 S.Ct. 416, 418, 57 L.Ed. 815."

In the present case, therefore, it cannot be denied that the derailment of the motor car was an extraordinary and not a usual happening. From the nature of the accident it accordingly follows that a jury could fairly find that the derailment occurred as the result of negligence. And from the evidence assembled in the statement of the case herein a jury could also

fairly find that the derailment did not result from any negligence of plaintiff and appellant.

The motor car which jumped the track was furnished and maintained by defendant and respondent. The tracks, rails, and roadbed over which it was traveling when it jumped the track were maintained, controlled, and patrolled by defendant and respondent. From the facts of the occurrence a finding or inference of negligence on the part of defendant and respondent was fairly warranted. The facts of the occurrence therefore entitled plaintiff and appellant to the rule of *res ipsa loquitur* and established a foundation of liability entitling plaintiff and appellant to have his case submitted to the jury. Error of the District Court in granting defendant's motion for directed verdict and directing a verdict for defendant is therefore demonstrated and requires a reversal of the judgment appealed from.

(b) Apart from res ipsa loquitur.

The Supreme Court has repeatedly affirmed and applied the rule that Federal Employers' Liability Act cases must go to the jury if there is any rational basis in the evidence for a plaintiff verdict. (*Wilkerson v. McCarthy,* 336 U.S. 53, 69 S. Ct. 413, 93 L. Ed. 497; *Myers v. Reading Co.,* 331 U.S. 477, 67 S. Ct. 1335, 91 L. Ed. 1615; *Ellis v. Union Pac. R. R. Co.,* 329 U.S. 649, 67 S. Ct. 598, 91 L. Ed. 572; *Lavender v. Kurn,* 327 U.S. 645, 66 S. Ct. 740, 90 L. Ed. 421; *Tennant v. Peoria & P. U. Ry.,* 321 U.S. 29, 64 S. Ct. 409, 88 L. Ed. 520; *Bailey v. Central Vermont Ry.,*

319 U.S. 350, 63 S. Ct. 1062, 87 L. Ed. 1444; *Tiller v. Atlantic Coast Line Co.,* 318 U.S. 54, 63 S. Ct. 444, 87 L. Ed. 610; *Jenkins v. Kurn,* 313 U.S. 256, 61 S. Ct. 934, 85 L. Ed. 1316.)

Rational basis for a plaintiff verdict in this case is unmistakable from the evidence earlier assembled.

Defendant was responsible for the motor car furnished the employee. It was so constructed that in operation it swayed from side to side and was unstable on the rails (T 69-70). It was so constructed that a small object, such as a grade stake, pressing against or striking its underside or its parts below the floor or deck would cause its derailment. And it was so constructed that its underside and its parts below the floor or deck were open and exposed and susceptible of being struck by objects such as grade stakes.

Defendant was also responsible for the tracks and roadbed on or over which the employee operated the motor car. In the work of surveying and grading employees of the defendant used grade stakes. Sometimes they were driven or placed in the roadbed; sometimes they were driven or placed outside the roadbed. There was evidence that the length of these grade stakes exceeded the clearance between the open and exposed underside of the motor and the roadbed (T 53, 172-175). Certain employees of the defendant were charged with the duty of patrolling and inspecting the roadbed and removing therefrom such objects as grade stakes and brake hanger irons (T 172, 192-193). Sometimes

they discharged that duty; sometimes they did not (T 178). There was evidence that a brake hanger iron was on the roadbed at the time the motor car was derailed. It had been there 30 or 40 days (T 145-146). There was evidence that a grade stake was on the roadbed at the time the motor car was derailed. It was weathered and had oil on it (T 91, 151). At least two inspections made by employees of the defendant on the morning of the accident had failed to detect the presence on the roadbed of either the brake hanger iron or the grade stake. There was evidence that the grade stake found at the accident scene had struck or pressed against the open and exposed underside of the motor car and parts and caused the derailment. Two section gangs were working in the area of the accident scene at and before the accident. The use of a grade stake on the roadbed at the accident scene in anticipation of grading by them could reasonably be inferred, for the roadbed ballast at the accident scene was six inches lower than adjacent ballast.

From probative facts with which the record teems, the conclusion is therefore inevitable that rational basis for a plaintiff verdict is found in the evidence, amply supporting the allegations of the complaint (T 12) that plaintiff was injured because "defendant carelessly and negligently failed to inspect said motor car and said track and roadbed and learn of their defective, insecure and insufficient condition, and carelessly and negligently failed to provide a safe motor car and safe track and roadbed for plaintiff".

Apart from the doctrine of *res ipsa loquitur,* error of the District Court in granting defendant's motion for directed verdict and directing a verdict for defendant is therefore demonstrated and requires a reversal of the judgment appealed from.

THE EVIDENCE INTRODUCED AT THE TRIAL WAS OF SUCH CHARACTER THAT IT CLEARLY INDICATED AND ESTABLISHED THAT PLAINTIFF WAS INJURED AS THE PROXIMATE RESULT OF DEFENDANT'S NEGLIGENCE AND FOR THAT REASON THE ACTION OF THE TRIAL COURT IN INSTRUCTING THE JURY TO RETURN A VERDICT IN FAVOR OF THE DEFENDANT AND AGAINST PLAINTIFF WAS AND IS CONTRARY TO THE LAW AND EVIDENCE. (Specification of Error No. 2.)

This Specification of Error is merely a restatement and particularization of Specification of Error No. 1 and the arguments made under that specification are incorporated in this specification.

THE DISTRICT COURT ERRED IN ENTERING FINAL JUDGMENT IN FAVOR OF DEFENDANT. (Specification of Error No. 3.)

The error of the District Court in granting the motion for directed verdict was carried over into the final judgment it thereafter entered. If the court erred in granting the motion, its error in entering the judgment is equally obvious and additional arguments are not indicated.

CONCLUSION.

Appellant therefore respectfully submits that the judgment entered on the directed verdict for defendant should be reversed.

Dated, San Francisco, California,
August 9, 1950.

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